

1990

# Auditing Division, Utah State Tax Commission v. Nucor Corporation, Nucor Steel - Utah Division : Unknown

Utah Supreme Court

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 900328

**FILED**

AUG 13 1990

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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AUDITING DIVISION, UTAH STATE	)	DOCKETING STATEMENT
TAX COMMISSION,	)	
	)	
Petitioner,	)	Case No. 900328
	)	
vs.	)	Priority 14A
	)	
NUCOR CORPORATION, NUCOR STEEL	)	
UTAH DIVISION,	)	
	)	
Respondent.	)	

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Pursuant to Rule 9, Rules of the Utah Supreme Court, Petitioner, Auditing Division, Utah State Tax Commission, ("Tax Commission") hereby submits this docketing statement.

1. Jurisdiction. The Utah Supreme Court has jurisdiction over this matter pursuant to Utah Code Ann. §§ 78-2-2 (3)(e)(ii) and 63-46b-16 (1), (2)(a).

2. Nature of Proceedings. This is an appeal from the Findings of Fact, Conclusions of Law and Final Decision entered on June 7, 1990 by the Utah State Tax Commission granting Petitioner Nucor Corporation's ("Nucor") claim that graphite

from sales and use tax.

3. Dates of Decision and Filing of Petition for Review. The Utah State Tax Commission's decision was issued on June 7, 1990. The Tax Commission filed its Cross Petition for Review of Final Agency Order on July 23, 1990.

4. Statement of Material Facts. Nucor is engaged in the business of manufacturing steel and steel related products, slag, bag dust and scale in a mini-mill process located near Plymouth, Utah. Nucor purchases certain items of personal property, i.e. graphite electrodes, mill rolls, lance pipe, and stirring lances, in the operation of its mill. The Tax Commission issued a Preliminary Notice and Audit Report and a Statutory Notice of Deficiency on March 30, 1988 against Nucor during the auditing period of October 1, 1984, through September 30, 1987. The audit report of March 30, 1988 was followed by an Amended Audit Report on October 27, 1988 which concluded that Nucor's purchases of personal property were subject to sales and use tax.

On November 23, 1988, Nucor timely filed a Request for Agency Action protesting the Tax Commission's audit report claiming Nucor's purchases cannot escape the sales and use tax. Nucor claims an exemption to the sales and use tax pursuant to Utah Code Ann. § 59-12-104(28).

After a formal hearing on October 11, 1989, the State Tax Commission entered its order requiring Nucor to pay the deficient sales and use tax on the purchases of mill rolls, stirring lances, and lance pipe, but allowed the graphite electrode purchases to elude taxation.

On July 9, 1990, Nucor paid the deficient sales and use tax under protest and at the same time filed its Petition for Review of Final Agency Action before this court. This was followed by a Cross Petition for Review of Final Agency Action filed on July 23, 1990 by the Tax Commission disputing the holding of the State Tax Commission insofar as the decision allows Nucor's graphite electrode purchases to escape the sales and use tax.

5. ISSUES PRESENTED FOR REVIEW. Whether the State Tax Commission erred in ruling that Nucor's purchases of graphite electrodes are exempt from the sales and use tax under Utah Code Ann. § 59-12-104(28).

The applicable standard of review for this issue is Utah Code Ann. § 63-46b-16(4)(d). Pursuant to § 63-46b-16(4)(d) this Court can grant relief if it is determined that the State Tax Commission erroneously interpreted or applied the law. The Utah Administrative Procedures Act, Utah Code Ann. § 63-46b-1

to -21 (1989) "is applicable to all agency adjudicative proceedings commenced by or before any agency on or after January 1, 1988." Stegan v. Dep't of Employment Sec., 751 P.2d 1160, 1162 n.1 (Utah Ct. App. 1987).

6. DETERMINATIVE LAW:

A. Statutes: Utah Code Ann. § 59-12-104(28) (1987).

B. Cases: C.F.& I. Steel Corp. v. Charnes, 637 P.2d 324 (Colo. 1987). Union Portland Cement Co. v. State Tax Comm'n, 170 P.2d 164 (1946). Parsons Asphalt Products v. Utah State Tax Comm'n, 617 P.2d 397 (1980).

7. PRIOR APPEALS: None.

8. Assignment to the Court of Appeals. This appeal is not subject to assignment to the Court of Appeals.

DATED this 13<sup>th</sup> day of <sup>August</sup> ~~July~~, 1990.

ATTORNEY GENERAL'S OFFICE

By: 

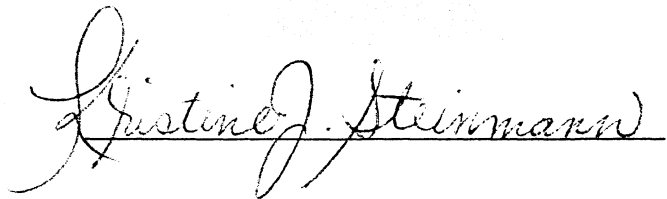
Brian L. Tarbet  
Assistant Attorney General

**CERTIFICATE OF MAILING**

I hereby certify that on the 13<sup>th</sup> day of August, 1990, a true and correct copy of the foregoing CROSS PETITION FOR REVIEW OF FINAL AGENCY ACTION, was mailed via United States Postal Service, first class, postage pre-paid, to:

Mark K. Buchi, Esq.  
HOLME, ROBERTS & OWEN  
50 South Main, Suite 900  
Salt Lake City, Utah 84144

Murray Ogborn, Esq.  
HARDING & OGBORN  
1200 17th Street, Suite 1000  
Denver, Colorado 80202

A handwritten signature in cursive script, reading "Christine J. Steinmann", written over a horizontal line.

BEFORE THE UTAH STATE TAX COMMISSION

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NUCOR CORPORATION,	)	
NUCOR STEEL - UTAH DIVISION,	:	
	)	
Petitioner,	:	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
v.	:	AND FINAL DECISION
	)	
AUDITING DIVISION OF THE	:	
UTAH STATE TAX COMMISSION,	:	Appeal No. 88-2850
	)	
	:	
Respondent.	)	

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STATEMENT OF CASE

This matter came before the Utah State Tax Commission for a formal hearing on October 11, 1989. Hearing the matter on behalf of the Tax Commission were Joe B. Pacheco, Commissioner, Roger O. Tew, Commissioner, Paul F. Iwasaki, Hearing Officer, and G. Blaine Davis, Commissioner and Presiding Officer. Present and representing the Petitioner were Murray Ogborn and Tim O'Neill, attorneys for the Petitioner. Present and representing the Respondent was Brian Tarbet, Assistant Attorney General.

The matter before the Commission involved a deficiency assessment for sales and use tax for the period October 1, 1984 through December 30, 1987 as determined by the Auditing

Division of the Utah State Tax Commission. That audit was consolidated with the Petitioner's claim for refund for sales and use tax dated December 23, 1987.

After a prehearing conference held before the Commission on January 27, 1989, the remaining issues to be determined by the Commission at the formal hearing involved the Petitioner's allegation that its purchase of certain items of personal property were exempt from sales and use tax pursuant to Utah Code Ann. § 59-12-104(28).

Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax in question is sales and use tax.
2. The audit period in question is October 1, 1984 through September 30, 1987.
3. Petitioner is engaged in the business of manufacturing steel and steel related products in a minimill process located near Plymouth, Utah.
4. The steel manufacturing process consists of the melting and refining of scrap iron. The scrap iron is placed in charge buckets which, when loaded, weigh approximately 25 tons. The buckets are dumped into electric arc furnaces. Graphite electrodes, which are suspended above the furnace roof, are then lowered into the furnace and charged with electricity. This charging process creates intense heat which in turn melts the scrap iron.



5. The graphite electrodes utilized by the Petitioner consists of three sections connected by graphite nipples which form a column. Each section of the graphite electrode is approximately 1400 pounds, cylindrical in shape, 18 inches in diameter, 96 inches in length and composed of carbon.

6. As the scrap iron melts, the graphite electrodes themselves become consumed by the molten metal. Approximately 55% of the electrodes become a part of the final product.

7. The introduction of the graphite electrodes into the molten metal provides the metal with carbon which is essential in the manufacturing of steel.

8. Approximately 41% of the carbon content of the final steel product comes from the carbon introduced from the graphite electrodes consumed. The remaining percentage comes from carbon raisers or the carbon found in the items of scrap used in the melting process.

9. The consumption of the graphite electrodes in the melting process is unavoidable and necessary in that the Petitioner relies upon the carbon content of the electrodes as a source of carbon for the final steel product.

10. Lance pipes utilized by the Petitioner are steel pipes approximately one inch in diameter which vary in length. The lance pipes are used by the Petitioner to inject oxygen into the furnace as well as to open a tap hole in the furnace.

11. Because of the intense heat to which the lance pipes are exposed, the lance pipes melt and become a part of the molten metal. Approximately 75 to 100 pounds of lance pipe are consumed during each charge.

12. The stirring lance used by the Petitioner is a steel pipe, 1.9 inches in diameter, composed of iron and surrounded by a 3.55 inch layer of ceramic material. The stirring lance is used to inject nitrogen and argon into the molten metal thus removing unwanted ingredients. Because of the extreme temperature of the molten metal, the stirring lances melt and become a part of the molten metal.

13. The mill rolls utilized by Nucor Steel in its manufacturing process are cylindrical in shape, varying from 11.8 to 70.8 inches in length, varying from 14.9 inches to 27.1 inches in diameter and composed of iron. The cost of the mill rolls range from \$.49 to \$5.23 per pound. Each mill roll is used to produce between 1,000 and 160,000 tons of steel. Mill rolls are used by Nucor Steel (a) to reduce the size and shape of billets to form the desired finished products; and, (b) when their usefulness is depleted, as an iron source for its products.

#### CONCLUSIONS OF LAW

Property purchased for resale in this state, in the regular course of business, and resold either in its original form or as an ingredient or component part of a manufactured or

compounded product is exempt from sales or use tax. (Utah Code Ann. § 59-12-104(28).)

DECISION AND ORDER

In the present case, there are four categories of items of personal property that the Petitioner maintains should be exempt from sales and use taxes under the provisions of § 59-12-104(28). They are as follows: (1) Graphite electrodes; (2) lance pipes; (3) stirring lances; and (4) rolling mills. Because of the unique nature and use to which each type of property is put, they will be discussed separately.

Section 59-12-104(28) has three elements which must be met before that exemption can be applied. The property must be: (1) purchased for resale; (2) in the regular course of business; and (3) either in its original form or as an ingredient or component part of a manufactured product. The Tax Commission in prior cases has held this to require inquiry as to the primary purpose for which the item was purchased.

It is against those three elements and the prior cases that each category of property in the present case is analyzed.

With respect to elements two and three of § 59-12-104(28), there is no dispute that the different items of personal property in question were purchased in the regular course of business and that they became an ingredient of the steel that was manufactured. What is in issue, however, is whether those

items were purchased for resale and whether the primary purpose for which they were purchased was to become an ingredient of the final product.

GRAPHITE ELECTRODES

Respondent argued that because less costly sources of carbon were available to the Petitioner for use in the manufacturing of steel, the motivation of the Petitioner in purchasing the graphite electrodes was not economically sound. Therefore, the Respondent argued the motivation for the Petitioner's use of the graphite electrodes must be other than that of purchasing the electrodes as a source of carbon.

Although it may be true that less expensive sources for carbon may have been available to the Petitioner, it does not necessarily follow that the use of the graphite electrodes as a carbon source could not be one of the primary factors in the purchase of those items.

The use of electrodes in an electric arc furnace is essential just as carbon is an essential element of steel. Here, Petitioner has found and purchased an item that serves both purposes.

The graphite electrodes created the heat necessary to melt the scrap metal and in the process, were consumed by the very molten mass it was creating. The electrodes then provided approximately 41% of the carbon content of the finished steel,

thus reducing the amount of carbon required from other sources. From this set of facts and circumstances, it is clear that the graphite electrodes serve two essential purposes in the manufacturing of steel. Therefore, one of the primary purposes for which the graphite electrodes were purchased was as an ingredient of the manufactured product.

LANCE PIPES AND STIRRING LANCES

Although the use to which the lance pipes and stirring lances ("pipes" and "lances") were put were different, the basis for their claimed exemption by the Petitioner are the same. Therefore, they will be discussed together.

The Petitioner contended that the pipes and lances were intended to be used to inject oxygen into the furnace and nitrogen into the molten metal and were also intended to be an iron source for its products.

There is no question that the pipes served the purpose of injecting oxygen and nitrogen during the refining phase. There are, however, real doubts that such items were intended to be a source of iron in the steel making process at the time they were purchased by the Petitioner. Although both parties stipulated that such were the intentions of the Petitioner, those assertions must be measured against the actual use to which the items were put and a determination must be made to see what the primary purposes were.

Under the facts and circumstances surrounding the use of the pipes and lances, it is not accepted that a primary purpose for their purchase was as a source of iron in the steel manufacturing process. While it is true that as the pipes and lances melted, and became a part of the finished product, there was insufficient showing this was anything more than an unavoidable consumption of the pipes that occurred when they were used in performing their essential functions. Furthermore, there was no showing that the slight amount of iron the pipes contributed to the steel was anything more than a fortuitous, incidental consequence, rather than an essential element upon which the success of the final product was dependent.

Therefore, under the analysis used in the prior cases, the Tax Commission finds that the primary purpose for the use of lance pipes and stirring lances was to inject gases during the refining process and that the parts of the rods which ultimately became a part of the finished product was merely an incidental use of those items.

#### MILL ROLLS

Mill rolls are cylindrical, steel rollers through which the billets of hot steel pass to be reduced and shaped into the final product.

The Petitioner argued that because particles of the mill rolls fuse with the billets as they pass through or flake off as scale, and because the mill rolls are eventually scrapped and used

as an iron source for the making of steel, their purchase should be exempt from sales tax.

Here again, the Tax Commission finds that the primary and only purpose for the purchase of the mill rolls was their use as mill rolls and not as a component part of the finished product. The gradual erosion of the mill rolls into the steel billets was so minute and insignificant that it cannot be reasonably said that the Petitioner intended and relied upon that phenomena to occur in the making of its final product.

The argument that the mill rolls are used as scrap and, therefore, should be exempt is equally unpersuasive. It is only after the mill rolls have eroded to the point that their usefulness as mill rolls is gone that they are then utilized as an iron source. At that point, it only makes economic sense that they are "recycled" and used as scrap rather than disposed of without recovering any residual value they might have.

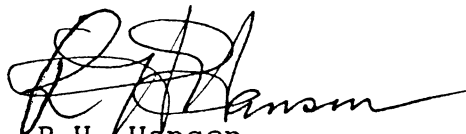
If one were to accept the Petitioner's argument, then anything purchased by the Petitioner which contained iron could be purchased tax exempt simply because the item could be scrapped once it had outlived its usefulness, was obsolete, or was beyond repair. This would include (as the Respondent's brief quite correctly points out) anything from a typewriter to train cars.

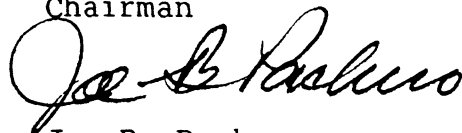
Based upon the foregoing, the Tax Commission finds that the purchase of the graphite electrodes by the Petitioner is exempt from sales or use tax as provided for by Utah Code Ann. § 59-12-104(28). The purchase of the lance pipes, stirring lances, and mill rolls, however, is not exempt from sales or use tax.


The Auditing Division is hereby ordered to amend its audit in accordance with this decision. It is so ordered.

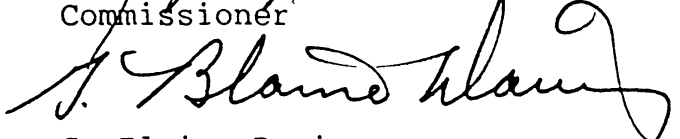
DATED this 7<sup>th</sup> day of June, 1990.

BY ORDER OF THE UTAH STATE TAX COMMISSION.

  
R.H. Hansen  
Chairman

  
Joe B. Pacheco  
Commissioner

  
Roger G. Few  
Commissioner

  
G. Blaine Davis  
Commissioner

NOTICE: You have ten (10) days after the date of the final order to file a request for reconsideration or thirty (30) days after the date of final order to file in Supreme Court a petition for judicial review. Utah Code Ann. §§ 63-46b-13(1), 63-46b-14(2)(a).

PFI/lgh/9101w





MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing  
Decision to the following:

Nucor Steel  
c/o Tim O'Neill  
500 The Atrium  
1200 North Street, P.O. Box 82028  
Lincoln, NE 68501

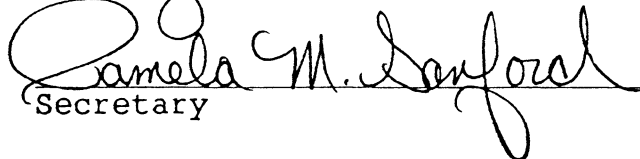
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✓ Brian Tarbet  
Assistant Attorney General  
State Capitol Building  
Salt Lake City, UT 84114

DATED this 8<sup>th</sup> day of June, 1990.

  
Secretary